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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOANN AGUILAR, surviving parent of AARON ANAYA, JR., decedent, Plaintiff/Appellant, v. R.W. STRUNK EXCAVATING, INC., an Arizona corporation, Defendant/Appellee.	2 CA-CV 2011-0019 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20063147

Honorable Kenneth Lee, Judge

MOTION FOR RECONSIDERATION GRANTED;
APPEAL DISMISSED

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and

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H O W A R D, Chief Judge.

¶1 Appellee R.W. Strunk Excavating (Strunk) filed a motion for reconsideration from our June 30, 2011 decision order denying Strunk's previous motion to dismiss. In its motion for reconsideration, Strunk argues this court does not have jurisdiction over the appeal, citing the Arizona Supreme Court's recent decision in *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624 (2011). We agree, and therefore grant Strunk's motion for reconsideration and dismiss the appeal.

Factual and Procedural Background

¶2 JoAnn Aguilar sued Gregory Artz and Strunk for the death of her son in a vehicle accident.[1] Strunk filed a motion for summary judgment, arguing that it could not be held vicariously liable for Artz's actions. The trial court granted the motion following argument on October 18, 2010. On October 27, Strunk lodged a proposed form of judgment. On October 28, 2010, the court signed a form of judgment that Aguilar had submitted; the judgment was filed on October 29. The judgment included finality language from Rule 54(b), Ariz. R. Civ. P., but did not award costs to any party.

¶3 On November 4, 2010, Strunk filed a motion to alter or amend the judgment pursuant to Rule 59(l), Ariz. R. Civ. P., in which it argued it had not been served with Aguilar's proposed form of judgment and that, in any event, the judgment did not include an award of costs, which Strunk was entitled to as the prevailing party. Four days later, Aguilar filed a notice of appeal from the October judgment. Thereafter, on

[1]Aaron Anaya joined in the original lawsuit over the death of his son and in the notice of appeal, but does not join in the appeal.

December 1, 2010, the trial court filed a second signed judgment which had been lodged by Strunk on October 27. It included an award of costs, but did not contain Rule 54(b) finality language or stay the remaining superior court proceedings. The same day, Aguilar appears to have re-filed the same notice of appeal which, like her first notice of appeal, specified that the appeal was being taken from the judgment entered on October 28, 2010.

¶4 A week later, on December 8, the trial court issued a minute entry stating it was granting Strunk's motion to amend, vacating the October judgment, and signing the proposed judgment Strunk had submitted with the Rule 59(l) motion. That judgment was filed the same day. Although that judgment awarded the same costs to Strunk as the December 1 judgment, it also included Rule 54(b) finality language and an order to stay the remainder of the proceedings.

¶5 Both parties filed appellate briefs in this court. Strunk filed a motion to dismiss the appeal for a lack of jurisdiction. We denied the motion to dismiss, holding Strunk's initial notice of appeal did not grant this court jurisdiction, but that the second notice of appeal did. As stated above, Strunk filed a motion for reconsideration based on *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624 (2011).

Discussion

¶6 We have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Our jurisdiction is prescribed by statute, and we have no authority to entertain an

appeal over which we do not have jurisdiction. *See Hall Family Props., Ltd. v. Gosnell Dev. Corp.*, 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995).

¶7 Section 12-2101(A), A.R.S., vests jurisdiction in this court for an appeal "[f]rom a final judgment." There exists

> only a limited exception to the final judgment rule that allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial.

Smith v. Ariz. Citizens Clean Elections Comm'n, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006). Absent these limited circumstances, a notice of appeal filed "while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity." *Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011). This prevents the court process from being disrupted and two courts from acting simultaneously. *Engel v. Landman*, 221 Ariz. 504, ¶ 13, 212 P.3d 842, 847 (App. 2009). Our supreme court has recently reaffirmed that the exception, first described in *Barrassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), is a limited one. *Craig*, 227 Ariz. 105, ¶¶ 13-14, 253 P.3d at 626.

¶8 We previously correctly concluded that Aguilar's first notice of appeal was ineffective, as it was filed while the trial court still was considering Strunk's motion to amend. *See Barrassi*, 130 Ariz. at 422, 636 P.2d at 1204. We then incorrectly concluded that the second notice of appeal was effective to appeal from the December 1 order which we termed a final judgment.

¶9 First, the December 1 order is not a final, appealable judgment because it did not adjudicate the rights of all parties to the lawsuit. *See* Ariz. R. Civ. P. 54(b); A.R.S. § 12-2101(A)(1). In such a case, pursuant to Rule 54(b) a trial court may nonetheless "direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and . . . an express direction for the entry of judgment." Here, the trial court had not made any such determination on December 1. Because the judgment did not resolve the claim against Artz and did not include Rule 54(b) language, it was not a final judgment. Therefore, we do not have jurisdiction over an appeal of this partial judgment. *See Sullivan & Brugnatelli Adver. Co. v. Century Capital Corp.*, 153 Ariz. 78, 80, 734 P.2d 1034, 1036 (App. 1986) (no jurisdiction over appeal from order adjudicating claims against less than all parties in absence of Rule 54(b) language).

¶10 Second, a motion to amend a judgment under Rule 59(l) is a time-extending motion pursuant to Rule 9(b)(3), Ariz. R. Civ. App. P. On December 1, the trial court still had not ruled on Strunk's motion to amend and did not do so until the following week. Thus, Strunk's motion to amend was pending until the court granted it in its December 8 minute entry. A notice of appeal filed while a time-extending motion is pending is a nullity. *Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626.

¶11 Aguilar argues, however, that the only task remaining after the trial court's December 1 judgment was ruling on the motion to amend, which she describes as simply a ministerial task. She argues this brings her notice of appeal within the *Barassi* exception. Aguilar appears to base this on her assumption that the court's December 1

order had adopted the proposed judgment Strunk had submitted in connection with its motion to amend. However, on December 1, the court executed the order that had been lodged by Strunk on October 27, not in conjunction with its motion to amend. And although Strunk's motion to amend requested the inclusion of the Rule 54(b) finality language and a stay of the proceedings, the December 1 order did not. The court could have opted to deny Strunk's motion to amend, in whole or in part. And the decision to grant or deny a request to include Rule 54(b) language is not a ministerial task, *see generally S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶¶ 16-23, 977 P.2d 769, 774-76 (1999), nor is the decision on whether to grant a stay, *see State v. Ott*, 167 Ariz. 420, 428-29, 808 P.2d 305, 313-14 (App. 1990), *see generally* A.R.S. § 12-123(B) (superior court has power "necessary to the complete exercise of its jurisdiction"). And, although the court had included Rule 54(b) language in the October judgment, it vacated that judgment. Therefore, this case does not fall into the *Barassi* exception. *See Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d at 626.

¶12 Aguilar nevertheless claims, and our original order denying the motion to dismiss states, that the trial court "effectively ruled on" the motion to amend by entering the December 1 order. First, the December 1 order did not include the required Rule 54(b) language or stay the proceedings as requested. Second, that order had not been submitted with the Rule 59(l) motion, but rather had been submitted previously. Third, allowing the court to "effectively rule on" a time-extending motion by any action other than an express grant or denial abrogates the bright-line rule established in *Barassi* and confirmed in *Craig*. It places a litigant in the position of having to guess when a trial

court action "effectively rules on" a time-extending motion and, if the litigant guesses wrong, risk filing an ineffectively premature or late notice of appeal. This introduces uncertainty in an area where certainty is required. Therefore, we reject any suggestion that a trial court can through other actions and without mentioning the time-extending motion effectively rule on such a motion.

¶13 For all these reasons, Aguilar's notice of appeal is a nullity. *See id.* Because the notice of appeal is a nullity, we do not consider whether any party was prejudiced, as we would if the notice had come under the *Barrassi* exception. *See Barassi*, 130 Ariz. at 421, 636 P.2d at 1203. We grant Strunk's motion for reconsideration and dismiss the appeal.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge